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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

v.

CHRISTOPHER DEEDY,

Defendant.

) CRIMINAL NO. 11-1-1647 *AW*
)
) COUNT I: MURDER IN THE SECOND
) DEGREE (§§ 707-701.5 and 706-
) 656, H.R.S.)
)

) COUNT II: CARRYING OR USE OF
) FIREARM IN THE COMMISSION
) OF A SEPARATE FELONY
) (§ 134-21, H.R.S.)
)

) DEFENDANT CHRISTOPHER
) DEEDY'S MOTION TO DISMISS
) INDICTMENT BASED ON
) SUPREMACY CLAUSE IMMUNITY;
) MEMORANDUM IN SUPPORT OF
) MOTION; DECLARATION OF
) BROOK HART; EXHIBITS A, B, and
) C; NOTICE OF MOTION;
) CERTIFICATE OF SERVICE
)

) TRIAL WEEK: 09/10/12
) PTM DATE: 05/11/12
) BAIL STATUS: Released
)


) HEARING DATE: 7/13/12
) HEARING TIME: 1:00 P.M.
) JUDGE: Hon. Karen
S.S. Ahn

**DEFENDANT CHRISTOPHER DEEDY'S MOTION TO DISMISS
INDICTMENT BASED ON SUPREMACY CLAUSE IMMUNITY**

Defendant, United States Department of State Special Agent Christopher Deedy, by and through his undersigned counsel, hereby moves this court for an order dismissing the Indictment, with prejudice, in the above-entitled case on the ground that he is immune from prosecution based on the Supremacy Clause to the United States Constitution. U.S. CONST. art. VI, cl. 2.

This motion is filed pursuant to Rule 12(b) and Rule 47 of the Hawaii Rules of Penal Procedure. This motion is supported by the attached Memorandum in Support of Motion to Dismiss, Declaration of Brook Hart, Exhibits A, B (pages 1-282), and C, the records and files of this case, and such argument and evidence as the court may receive at a hearing upon this motion.

DATED: Honolulu, Hawaii, May 11, 2012.


BROOK HART
MARGARET NAMMAR
Attorneys for Defendant
CHRISTOPHER DEEDY

STATE OF HAWAII

Defendant.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS INDICTMENT
BASED ON SUPREMACY CLAUSE
IMMUNITY**

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
INDICTMENT BASED ON SUPREMACY CLAUSE IMMUNITY**

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES.....	i-iv
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
A. PROCEDURAL BACKGROUND.....	2
B. FACTUAL BACKGROUND.....	2
III. APPLICABLE LAW.....	8
A. PROCEDURAL LAW.....	8
B. SUPREMACY CLAUSE LAW.....	9
1. The Official Duty Inquiry.....	12
2. The "Necessary and Proper" Inquiry.....	14
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

Page(s)

STATE CASES:

State v. Hanapi,

89 Haw. 177, 970 P.2d 485 (1998) 1, 8

FEDERAL CASES:

Baucom v. Martin,

677 F.2d 1346 (11th Cir. 1982) 11, 16

City of Jackson v. Jackson,

235 F. Supp. 2d 532 (S.D. Miss. 2002) 9, 16

Clifton v. Cox,

549 F.2d 722 (9th Cir. 1977) 1, 10, 11, 12, 15, 17

Graham v. Connor,

490 U.S. 386 (1989) 15

Hancock v. Train,

426 U.S. 167 (1976) 9

In re Fair,

100 F. 149 (D. Neb. 1900) 15

In re Lewis,

83 F. 159 (D. Wash. 1897) 11, 15

In re McShane,

235 F.Supp. 262 (N.D. Miss. 1964) 11, 12, 15

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<u>In re Neagle,</u>	
135 U.S. 1 (1890)	1, 10, 12, 14, 15, 17
<u>Johnson v. Maryland,</u>	
254 U.S. 51 (1920)	11
<u>Kennedy v. City of Cleveland,</u>	
797 F.2d 297 (6th Cir. 1986)	9
<u>Kentucky v. Long,</u>	
837 F.2d 727 (6th Cir. 1988)	1, 9, 11, 12, 14, 16
<u>Mitchell v. Forsyth,</u>	
472 U.S. 511 (1985)	9
<u>McCulloch v. Maryland,</u>	
17 U.S. 316 (1819)	9
<u>Nixon v. Fitzgerald,</u>	
457 U.S. 731 (1982)	9
<u>New York v. Tanella,</u>	
374 F.3d 141 (2nd Cir. 2004)	12
<u>People v. Zidek,</u>	
691 F. Supp. 1177 (N.D. Ill. 1988)	12
<u>Tennessee v. Davis,</u>	
100 U.S. 257 (1880)	9

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<u>Texas v. Carley,</u>	
885 F. Supp. 940 (W.D. Tex. 1994)	9
<u>United States v. Hoy,</u>	
137 F.3d 726 (2nd Cir. 1998)	11, 12
<u>United States v. Lipsett,</u>	
156 F. 65 (W.D. Mich. 1907)	15
<u>United States ex rel. McSweeney v. Fullhart,</u>	
47 F. 802 (W.D. Pa. 1891)	15
<u>United States v. Reid,</u>	
517 F.2d 953 (2nd Cir. 1975)	12, 13
<u>Whitehead v. Senkowski,</u>	
943 F.2d 230 (2nd Cir. 1991)	1, 12, 14, 17
<u>Wyoming v. Livingston,</u>	
443 F.3d 1211 (10th Cir. 2006)	12

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS:

U.S. CONST. art. VI, cl. 2	1, 9
----------------------------------	------

STATE STATUTES:

H.R.S. § 134-21	2
H.R.S. § 706-656	2
H.R.S. § 707-701.5	2

FEDERAL STATUTES:

18 U.S.C. § 16	14
18 U.S.C. § 111	5, 14
18 U.S.C. § 1114	14
22 U.S.C. § 2709	13
22 U.S.C. § 2709(a)(5)	13
28 U.S.C. § 2671	13

RULES:

Rule 12(b), Hawaii Rules of Penal Procedure	1, 8
Rule 12, Federal Rules of Criminal Procedure	8, 9

OTHER AUTHORITIES:

U.S. Dep't of State Foreign Affairs Manual, Diplomatic Security Deadly Force and Firearms Policy 12 FAM 023	13
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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
INDICTMENT BASED ON SUPREMACY CLAUSE IMMUNITY**

I. INTRODUCTION

The Supremacy Clause to the United States Constitution provides immunity from state prosecution for federal officers for conduct performed in the course of their official duties that is honestly and reasonably believed to be necessary and proper. U.S. CONST. art. VI, cl. 2. This constitutional defense is properly raised in a pretrial motion to dismiss and should be adjudicated prior to trial. See State v. Hanapi, 89 Haw. 177, 184, 970 P.2d 485, 492 (1998); HRPP Rule 12(b); Kentucky v. Long, 837 F.2d 727, 750 (6th Cir. 1988).

On November 5, 2011, in response to attacks on himself and Adam Gutowski ("Gutowski"), United States Department of State Special Agent Christopher Deedy ("Agent Deedy") was involved in an incident in which he discharged his federally approved weapon. One of the shots resulted in the death of the attacker Kollin Elderts ("Elderts"). Agent Deedy had an honest belief that his conduct was necessary and proper to the performance of his federal law enforcement duties. In the face of

Agent Deedy believed that the

actions he took were reasonable under the circumstances as they appeared to him; he is therefore completely immune to criminal liability. This immunity is an extension of the principle that "the government of the United States in the exercise of all the powers conferred upon it by the constitution," is supreme to that of the states. In re Neagle, 135 U.S. 1, 62 (1890). Accordingly, it is well established that if a federal officer

is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do . . . and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of [any] state There is no occasion for any further trial in the state court, or in any court.

Id. at 75; see also Clifton v. Cox, 549 F.2d 722, 730 (9th Cir. 1977) (recognizing that under proper circumstances the Supremacy Clause provides immunity to a federal official from state criminal laws); Whitehead v. Senkowski, 943 F.3d 230, 233-34 (2nd Cir. 1991) (same); Long, 837 F.2d at 744 (same). Thus, pursuant to the Supremacy Clause of the United States Constitution, Agent Deedy is immune from prosecution and the Indictment must be dismissed.

II. BACKGROUND

A. PROCEDURAL BACKGROUND

After a November 6, 2011, Complaint charging Agent Deedy with murder in the second degree, in violation of H.R.S. §§ 707-701.5¹ and 706-656, and carrying or use of firearm in the commission of a separate felony, in violation of H.R.S. § 134-21,² an Indictment was filed on November 16, 2011, charging him with the same offenses. Having previously posted bail of \$250,000, on November 21, 2011 Agent Deedy appeared in the Circuit Court of the First Circuit, State of Hawaii, and was arraigned on the charges. Agent Deedy pleaded "not guilty" to both counts. Trial is currently scheduled to commence on September 10, 2012.

B. FACTUAL BACKGROUND

Agent Deedy has been employed as a Special Agent by the United States Department of State Diplomatic Security Service since June of 2009. [Declaration of Brook Hart, attached hereto, at paragraph 2] On November 4, 2011, Agent Deedy arrived in Honolulu, Hawaii, for a State Department special mission dignitary protection assignment for the Asia-Pacific Economic Cooperation ("APEC"). [Id.] After an official meeting of State Department personnel, Agent Deedy met with two of his friends who reside in Honolulu, Gutowski and Jessica West ("West").

¹ § 707-701.5. Murder in the second degree reads:

- (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.
- (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

² § 134-21. Carrying or use of firearm in the commission of a separate felony reads:

- (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection when the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), or [707-716(1)(c)]; or
- (4) The felony offenses of criminal property damage in the first degree under section 708-820 or criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

- (b) A conviction and sentence under this section shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under this section may run concurrently or consecutively with the sentence for the separate felony.
- (c) Any person violating this section shall be guilty of a class A felony.

[Id.] The three spent the evening together socializing at various locations in downtown Honolulu and in Waikiki. [Id.]

Also on that Friday evening and Saturday morning of November 4 and 5, 2011, Elderts and his friend Shane Medeiros ("Medeiros") had been with their friends in downtown Honolulu and in Waikiki.³ [Id. at paragraph 3]

At approximately 2:30 a.m., on November 5, 2011, Agent Deedy, Gutowski, and West entered the McDonald's restaurant, located at 2237 Kuhio Avenue in Waikiki. [Declaration of Brook Hart at paragraph 4] Gutowski ordered food. [Id.] The three sat in a booth located on the Ewa side of the restaurant near the highchairs and the toy display. [Id.] As they were eating their meal, Agent Deedy the McDonald's cashier counter

[Id.] Elderts and Medeiros had entered the restaurant together. [Id.] Perrine had entered the establishment alone, approximately two minutes after Elderts and Medeiros. [Id.] While at the cashier counter,

[Id.]

[Id.]

[Id.; see generally] Exhibits A (McDonald's multi-angle surveillance video footage) and B pages 1-45 (screen captures of McDonald's video footage and "Maisch" video footage)]⁴

After ordering their food, Elderts and Perrine sat at separate tables. [Declaration of Brook Hart at paragraph 5] Perrine sat on the Diamond Head side of the restaurant, which was opposite of where Agent Deedy, West, and Gutowski were sitting, about eighteen feet away.

[Id.] Elderts sat at a central aisle table facing the cashier counter,

[Id.] Agent Deedy

[Id.] Upon rising from his table and

[Id.]

[Id.]

³ Agent Deedy and his friends and Elderts and his friends did not know each other and did not have any contact or interaction at any time prior to the incident at the McDonald's.

⁴ The time stamp on the McDonald's surveillance video is approximately Standard Time.

[Id.]

[Id.] Having observed this, Agent Deedy

[Id.]

[Id.; see generally Exhibits A and B pages 46-66]

At this point,

[Declaration of Brook Hart at paragraph 6] Agent Deedy

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.] After a brief exchange of words

[Id.; see generally Exhibits A and B pages 67-79]

[Declaration of Brook Hart at paragraph 7]

[Id.]

[Id.] West, who had been on her way out of the restaurant, returned

[Id.]

[Id.]

[Id.; see generally Exhibits A and B pages 80-92]

[Declaration of

Brook Hart at paragraph 8]

[Id.]

[Id.]

[Id.]

[Id.; see generally Exhibits A and B pages 93-95]

[Declaration of Brook Hart at paragraph 9]

[Id.]

[Id.]

[Id.; see generally Exhibits A and B

pages 96-105]

[Declaration of Brook Hart at paragraph 10]

[Id.]

[Id.; see generally Exhibits A and B pages 106-109]

[Declaration

of Brook Hart at paragraph 11]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

⁵ [Id.]

[Id.]

[Id.]

[Id.]

[Id.; see

generally Exhibits A and B pages 110-119]

[Declaration of Brook Hart at paragraph 12]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.; see generally Exhibits

A and B pages 120-142]

[Declaration of Brook Hart at

paragraph 13]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.; see

generally Exhibits A and B pages 143-155]

[Declaration of Brook Hart at paragraph 14]

[Id.]

in the death of Elderts. [Id.]

[Id.]

[Id.; see generally Exhibits A and B pages 156-164]

[Declaration of

Brook Hart at paragraph 15]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.]

[Id.; see generally Exhibits A, B pages 165-282, and C

]

[Declaration of Brook Hart at paragraph 16]

[Id.]

[Id.]

[Id.]

[Id.; see generally Exhibit A]

III. APPLICABLE LAW

A. PROCEDURAL LAW

Agent Deedy is a federal agent asserting a federal constitutional defense to state liability. He has appropriately requested pretrial dismissal of this prosecution pursuant to Rule 12(b) of the Hawaii Rules of Penal Procedure on Supremacy Clause grounds. Rule 12(b) states in relevant part that “[a]ny defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion.” “The preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss.” Hanapi, 89 Haw. at 184, 970 P.2d at 492.

Although this is a state court case and state procedural law governs, because this motion is based on a federal constitutional issue and HRPP Rule 12 and Federal Rule of Criminal Procedure 12 are similar, Fed. R. Crim. P. 12 and the Advisory Committee Notes to Fed. R. Crim. P. 12 are persuasive. The notes specifically recognize immunity from prosecution as a defense properly raised in a pretrial motion. Accordingly, federal courts have held that when

immunity based on the Supremacy Clause is raised as a defense, the matter is appropriately decided on a Rule 12(b) motion to dismiss. In Long, the Court held "that a Rule 12(b) motion is a proper vehicle by which to assert the defense of immunity under the Supremacy Clause of the United States Constitution." 837 F.2d at 750. The Court explained that "there comes a point early in the proceedings where the federal immunity defense should be decided in order to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the issue decided." Id. at 752 (citing Mitchell v. Forsyth, 472 U.S. 511 (1985); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986)); see also City of Jackson v. Jackson, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) (recognizing that defendant's motion to dismiss based on Supremacy Clause immunity was properly filed pursuant to Fed. R. Crim. P. 12(b)); Texas v. Carley, 885 F. Supp. 940, 944 (W.D. Tex. 1994) (same).

B. SUPREMACY CLAUSE LAW

The Supremacy Clause of the United States Constitution provides that the laws of the United States constitute the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. It is a "seminal principle of our law" under the Supremacy Clause that "the activities of the Federal Government are free from regulation by any state" except to the extent that Congress expressly provides to the contrary. Hancock v. Train, 426 U.S. 167, 178 (1976). The Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. 316, 322 (1819).

In Tennessee v. Davis, 100 U.S. 257 (1880), the Supreme Court held that federal officials are entitled to broad protection from state prosecution for the performance of federal duties. This protection is essential under the Supremacy Clause because:

[The United States] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, - if their protection must be left to the action of the State court, - the

operations of the general government may at any time be arrested at the will of one of its members. . . .

We do not think such an element of weakness is to be found in the Constitution. . . . No state government can exclude [the United States] from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

Id. at 263.

The Supremacy Clause provides broad protection against state prosecution as long as the federal officer reasonably believed the conduct at issue was necessary and proper to the performance of his federal duties. This fundamental principle was delineated by the Supreme Court in its landmark decision, In re Neagle. In re Neagle arose from a California state criminal prosecution for murder against a federal marshal who was indicted because he shot and killed a citizen who was menacing a justice of the Supreme Court that the marshal was assigned to protect. 135 U.S. at 3-5. At the time of the shooting, the citizen was actively threatening the justice, and the marshal reasonably, albeit mistakenly, believed that the citizen was armed. Id. at 53-54. In granting the marshal's habeas corpus petition to be released from state custody on Supremacy Clause grounds, the Supreme Court held that federal officials are immune from state prosecution for conduct they perform within the scope of federal employment that they reasonably believe is necessary and proper to the performance of their federal duties. Id. at 75. The Supreme Court explained:

To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court.

Id.

The Ninth Circuit applied the same reasoning in Clifton in dismissing a state criminal prosecution initiated against a federal law enforcement official for mistakenly killing an unarmed citizen in the course of a federal raid. 549 F.2d at 723. In Clifton, task force officers arrived at a

ranch via helicopter to execute arrest and search warrants for an illegal drug manufacturing operation. Id. at 724. While exiting the helicopter and amidst all of the commotion, one officer tripped and fell. Id. Believing that the officer had been shot, Agent Clifton rushed into the cabin and saw the only occupant running out of the cabin into a wooded area. Id. Agent Clifton shouted "Halt" twice, and when the fleeing person failed to stop, he fired at him. Id. The individual, who was unarmed, died en route to the hospital. Id. The Ninth Circuit concluded that Agent Clifton could not be held criminally liable in state court for the shooting. Clifton, 549 F.2d at 728. In dismissing the state prosecution, the Ninth Circuit emphasized that the test for immunity under the Supremacy Clause turns upon the federal officer's reasonable belief in the propriety of his action at the time, which was established by the officer's factual submission. Id. Although subsequent investigation revealed that the man was unarmed and posed no threat to the officers, "[p]roper application of [the Supremacy Clause] standard does not require a petitioner to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." Id.

Other federal court decisions have held federal officials immune from state prosecution under the Supremacy Clause. In Johnson v. Maryland, 254 U.S. 51, 57 (1920), the Supreme Court held that the state could not prosecute a post office employee for delivering mail without a state driver's license. In Long, 837 F.2d at 752, and Baucom v. Martin, 677 F.2d 1346, 1350 (11th Cir. 1982), the Sixth and Eleventh Circuits held respectively that federal agents who participated in undercover operations that allegedly violated state burglary and bribery laws were immune from state prosecution. In In re McShane, 235 F.Supp. 262, 274 (N.D. Miss. 1964), the district court determined that a federal agent who fired tear gas into a disruptive crowd could not be prosecuted by the state. The important principle underlying all of these decisions is that under the Supremacy Clause, federal officials acting within the scope of their federal employment are immune from state prosecution for any action they take that they reasonably believe is necessary and proper to the performance of their federal functions. This immunity from state prosecution fully covers discretionary conduct that is not mandated by any federal law, rule, or regulation. See United States v. Hoy, 137 F.3d 726 (2nd Cir. 1998). It also covers unauthorized and even unlawful conduct arising from honest mistakes or errors of judgment. See In re Lewis, 83 F. 159, 160 (D. Wash. 1897) ("[W]here an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact

transcends his authority . . . where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government.”). It does not matter that the conduct may later be determined to have been unjustified; it matters only that the officer reasonably believed that the conduct was necessary and appropriate at the time. See Clifton, 549 F.2d at 728.

Accordingly, the court is bound to apply the two-part test for Supremacy Clause immunity outlined in In re Neagle: (1) whether the federal officer was performing an act which he was authorized to do by the laws of the United States; and (2) in performing that act, the federal officer did no more than what was necessary and proper for him to do. See Wyoming v. Livingston, 443 F.3d 1211, 1221-22 (10th Cir. 2006); New York v. Tanella, 374 F.3d 141, 147 (2nd Cir. 2004); Whitehead, 943 F.2d at 234; Long, 837 F.2d at 744; Clifton, 549 F.2d at 730. If both prongs are met, the federal officer is entitled to immunity under the Supremacy Clause.

1. The Official Duty Inquiry

In re Neagle requires an initial inquiry into whether the acts of a federal agent were undertaken pursuant to his official duty. In re McShane’s Petition, 235 F. Supp. at 273. A federal agent must show a causal connection between his official authority and the conduct with which he is charged. People v. Zidek, 691 F. Supp. 1177 (N.D. Ill. 1988). Courts have found that federal law enforcement officers who encounter apparent violations of state law and intervene pursuant to agency policies are acting within the scope of their official duties as federal law enforcement officers, including when those officers are off-duty. See Hoy, 137 F.3d at 726; United States v. Reid, 517 F.2d 953 (2nd Cir. 1975). In Hoy, United States Deputy Marshal Schlagel, had been temporarily assigned to New York to assist in a special security detail for the World Trade Center bombing trial. 137 F.3d at 727. After completion of his assigned duties for the day, Schlagel went out to a nearby food market. Id. On his way to the market Schlagel encountered a woman lying on the sidewalk, crying and screaming, while a drunk man stood over the woman holding her purse. Id. Pursuant to an unwritten policy of the United States Marshals Service authorizing its deputy marshals to intervene when they observe the commission of state law crimes involving a threat of physical harm to another citizen, the federal marshal intervened. Id. The man struck the marshal and was charged with assaulting a federal officer. The Second Circuit held that the marshal was engaged in the performance of his official duties when he intervened in this matter. Id. at 731.

In Reid, an off-duty agent with the United States Drug Enforcement Agency ("DEA") was in the process of having his hair cut when he heard a commotion at the store next door. 517 F.2d at 955. He investigated and discovered a robbery in progress. Id. While attempting to protect the store owner and apprehend the robbers, he was shot by one of the robbers. Id. The Second Circuit held that the DEA special agent was acting within the scope of his official duties. Id. at 964. The Court specifically noted that pursuant to DEA policy, agents who witness a state law felony or violent misdemeanor are expected to take reasonable action to prevent the crime and/or apprehend the violator. Id. at 960.

Here, Agent Deedy was in Honolulu, Hawaii, for APEC and as a Special Agent,

See U.S. Dep't of State Foreign Affairs Manual, Diplomatic Security Deadly Force and Firearms Policy 12 FAM 023.

See id.; 22 U.S.C. § 2709. Special agents are empowered to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 22 U.S.C. § 2709(a)(5).

[A] law enforcement officer shall be construed to be acting within the scope of his or her office or employment, if the officer takes reasonable action, including the use of force, to--

- (1) protect an individual in the presence of the officer from a crime of violence;
- (2) provide immediate assistance to an individual who has suffered or who is threatened with bodily harm; or
- (3) prevent the escape of any individual who the officer reasonably believes to have committed in the presence of the officer a crime of violence.

28 U.S.C. § 2671. A "crime of violence" is defined as

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**DEFENDANT CHRISTOPHER DEEDY'S MOTION TO DISMISS
INDICTMENT BASED ON SUPREMACY CLAUSE IMMUNITY**

Defendant, United States Department of State Special Agent Christopher Deedy, by and through his undersigned counsel, hereby moves this court for an order dismissing the Indictment, with prejudice, in the above-entitled case on the ground that he is immune from prosecution based on the Supremacy Clause to the United States Constitution. U.S. CONST. art. VI, cl. 2.

This motion is filed pursuant to Rule 12(b) and Rule 47 of the Hawaii Rules of Penal Procedure. This motion is supported by the attached Memorandum in Support of Motion to Dismiss, Declaration of Brook Hart, Exhibits A, B (pages 1-282), and C, the records and files of this case, and such argument and evidence as the court may receive at a hearing upon this motion.

DATED: Honolulu, Hawaii, May 11, 2012.



BROOK HART
MARGARET NAMMAR
Attorneys for Defendant
CHRISTOPHER DEEDY

18 U.S.C. § 16.

Elderts committed federal felonies against Agent Deedy, including

These are all crimes of violence.

Agent Deedy was authorized by federal law when he interceded to protect an individual from a crime of violence that was committed in his presence, attempted to provide immediate assistance to _____ and ultimately protect himself from further _____ Agent Deedy's duties as a federal agent further provide authority for him to intervene if he observes a citizen in danger or violations of the law in progress.

He was, therefore, acting pursuant to his authority as a federal law enforcement officer.

2. The "Necessary and Proper" Inquiry

The second In re Neagle inquiry is whether the federal agent's actions were no more than "necessary and proper" to carry out his duty. This standard is met by satisfying two conditions: (1) the actor must subjectively believe his action was justified; and (2) his belief must be objectively reasonable. Whitehead, 943 F.2d at 234; see also Long, 837 F.2d at 745 ("On the subjective side, the agent must have an honest belief that his action was justified. On the

objective side, his belief must be reasonable.”). A defendant, however, need not “show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.” Clifton, 549 F.2d at 728. As a result, this Court must view the circumstances as they appeared to Deedy at the time of the incident. See id. at 728-29; Graham v. Connor, 490 U.S. 386, 396-97 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . allowing for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . . .”); United States v. Lipsett, 156 F. 65, 71 (W.D. Mich. 1907) (federal officer is “not liable to prosecution in the state court from the fact that from misinformation or lack of good judgment he transcended his authority”).

Errors in judgment in what a federal officer understands to be his legal duty will not, alone, serve to create criminal responsibility. In re Fair, 100 F. 149 (D. Neb. 1900) (soldiers shoot escapee based on questionable orders); In re Lewis, 83 F. at 161-62 (U.S. Treasury employees who wrongfully seized papers granted writ of habeas corpus). A federal officer exceeding his express authority does not necessarily strip himself of his lawful power to act under the scope of authority given to him under the laws of the United States. Clifton, 549 F.2d at 728. The standard by which the act committed by a federal officer will be measured considers the reasonableness and integrity of his actions in light of the circumstances as they appeared to him when he acted. In re McShane’s Petition, 235 F. Supp. at 273. A federal officer is entitled to release if the evidence reveals he had a reasonable belief under the circumstances that his actions were necessary at that time. See, e.g., United States ex rel. McSweeney v. Fullhart, 47 F. 802 (W.D. Pa. 1891) (“did he do more than was necessary and proper for him to do under the circumstances? This must be decided under all the circumstances, and keeping in mind the situation of the deputies when compelled to decide upon a course of action”); In re Lewis, 83 F. at 161 (“all they did was in an official capacity, without any private or individual malice, and without any felonious intent to commit a robbery or to do a criminal act.”); In re Neagle, 135 U.S. at 75-76 (“that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and he is not liable to answer in the courts of California on account of his part in that transaction”).

Once a threshold defense of immunity is raised, the State of Hawaii bears the burden of “coming forward with an evidentiary showing sufficient at least to raise a genuine factual issue

whether the federal officer was . . . doing no more than what was necessary and proper for him to do in the performance of his duties." Long, 837 F.2d at 752. The State cannot meet its burden "merely by way of allegations." Id.; see also Jackson, 235 F. Supp. 2d at 534 (stating that when "Supremacy Clause immunity defense [is raised] by way of motion to dismiss, the district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute").

Here, Agent Deedy

Objectively, Agent Deedy acted reasonably in light of all of the circumstances.

Agent

Deedy

Agent Deedy was

He was justified in using deadly force in return to protect himself and others. Agent Deedy

See Baucom, 677 F.2d at 1350. Agent Deedy had an honest belief that the conduct on which the criminal charges in this case are based was necessary to the performance of his law enforcement duties and that the actions he took were reasonable under the circumstances as they appeared to him. Accordingly, the State of Hawaii will not meet its burden of "coming forward with an evidentiary showing sufficient at least to raise a genuine factual issue whether the federal officer was . . . doing no more than what was necessary and proper for him to do in the performance of his duties." Long, 837 F.2d at 752.

IV. CONCLUSION

The evidence will establish that at the time of the events alleged in the Indictment, Special Agent Christopher Deedy was a federal employee of the United States Department of State and was an officer of the United States. The evidence will establish that there was a casual connection between his actions and the charges against him. The evidence will further establish that Agent Deedy's conduct was "necessary and proper" under the circumstances as perceived by

him. Clifton, 549 F.2d at 728. Additionally, the evidence will establish that Agent Deedy subjectively believed his actions were justified and his belief was objectively reasonable. Whitehead, 943 F.2d at 234.

Accordingly, the Indictment against Agent Deedy should be dismissed. His actions were no more than necessary and proper under the circumstances. In re Neagle, 135 U.S. 1 (1890).

DATED: Honolulu, Hawaii, May 11, 2012.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Brook Hart", written over a horizontal line.

BROOK HART
MARGARET NAMMAR
Attorneys for Defendant
CHRISTOPHER DEEDY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,)	CRIMINAL NO. 11-1-1647
)	
Plaintiff,)	<u>COUNT I: MURDER IN THE SECOND</u>
)	<u>DEGREE</u> (§§ 707-701.5 and 706-
v.)	656, H.R.S.)
)	
CHRISTOPHER DEEDY,)	<u>COUNT II: CARRYING OR USE OF</u>
)	<u>FIREARM IN THE COMMISSION</u>
Defendant.)	<u>OF A SEPARATE FELONY</u>
)	(§ 134-21, H.R.S.)
)	
_____)	DECLARATION OF BROOK HART

DECLARATION OF BROOK HART


1. I am an attorney for Defendant United States Department of State Special Agent Christopher Deedy ("Agent Deedy") in the above-entitled case.
2. I set forth the following facts upon information and belief: Agent Deedy has been employed as a Special Agent by the United States Department of State Diplomatic Security Service since June of 2009. On November 4, 2011, Agent Deedy arrived in Honolulu, Hawaii, for a State Department special mission dignitary protection assignment for the Asia-Pacific Economic Cooperation ("APEC"). After an official meeting of State Department personnel, Agent Deedy met with two of his friends who reside in Honolulu, Adam Gutowski ("Gutowski") and Jessica West ("West"). The three spent the evening together socializing at various locations in downtown Honolulu and in Waikiki.
3. Also on that Friday evening and Saturday morning of November 4 and 5, 2011, Kollin Elderts ("Elderts") and his friend Shane Medeiros ("Medeiros") had been with their friends in downtown Honolulu and in Waikiki.

4. At approximately 2:30 a.m., on November 5, 2011, Agent Deedy, Gutowski, and West entered the McDonald's restaurant, located at 2237 Kuhio Avenue in Waikiki. Gutowski ordered food. The three sat in a booth located on the Ewa side of the restaurant near the highchairs and the toy display.

4. At approximately 2:30 a.m., on November 5, 2011, Agent Deedy, Gutowski, and West entered the McDonald's restaurant, located at 2237 Kuhio Avenue in Waikiki. Gutowski ordered food. The three sat in a booth located on the Ewa side of the restaurant near the highchairs and the toy display.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING FACTS ARE
TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Executed on: May 11, 2012.



BROOK HART
Attorney for Defendant
CHRISTOPHER DEEDY